

1 IN THE UNITED STATES BANKRUPTCY COURT
2 FOR THE NORTHERN DISTRICT OF TEXAS
3 DALLAS DIVISION

4 WATTSTOCK, LLC § CASE NO. 21-31488-sgj11
§
5 DEBTOR. §
6
7 WATTSTOCK LLC., § CASE NO. 21-03083
§
8 PLAINTIFF, § DALLAS, TEXAS
§
9 VS. § WEDNESDAY, MAY 18, 2022
§
10 ALTA POWER, § 9:30 A.M.
§
11 DEFENDANT. §

ORAL ARGUMENTS

BEFORE THE HONORABLE STACEY G. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE

17 | APPEARANCES:

18 FOR THE DEBTOR: THOMAS DANIEL BERGHMAN, ESQ.
19 MUNSCH HARDT KOPF & HARR, P.C.
20 500 N. Akard Street
Suite 3800
Dallas, TX 75201
(214) 855-7554

22 FOR ALTA POWER LLC: JESSICA PULLIAM, ESQ.
23 JOHN B. LAWRENCE, ESQ.
24 KRISTIE WALLACE
BAKER BOTTS LLP
2001 Ross Avenue
Suite 900
Dallas, TX 75001
25 (214) 953-6873

1 APPEARANCES, CONTD:

2 FOR GENERAL ELECTRIC
3 INTERNATIONAL, INC.

ANDREW LEGRAND, ESQ.
POOJA PATEL, ESQ.
GIBSON DUNN & CRUTCHER LLP
2001 ROSS AVENUE
STE 2100
DALLAS, TX 75201

6

7 COURT RECORDER:

Clerk's Office
U.S. BANKRUPTCY COURT
501 W. 10TH STREET
FORT WORTH, TX 76102

8

9

10 TRANSCRIPTION SERVICE:

ACORN TRANSCRIPTS, LLC
Nancy B. Gardelli
3572 Acorn Street
North Port, FL 34286
(800) 750-5747

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1 C A L E N D A R

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4 Pleadings filed by 3rd Party Defendant
General Electric International Inc.

5 Motion to dismiss adversary proceedings
6 Filed by 3rd Party Defendant General
Electric International, Inc. (30)

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1 DALLAS, TEXAS, WEDNESDAY, MAY 18, 2022; 9:30 A.M.

2 THE COURT: All right. We're here this morning for
3 oral arguments in *Wattstock v. Alta Power, et al.*, Adversary
4 21-3083. We have oral arguments on a motion to dismiss filed
5 by third party Defendant, General Electric.

6 We'll get lawyer appearances at this time. First,
7 for General Electric.

8 MR. LEGRAND: Your Honor, this is Andrew LeGrand of
9 Gibson Dunn & Crutcher, on behalf of General Electric, along
10 with my colleague, Pooja Patel, of Gibson Dunn & Crutcher.

11 THE COURT: Okay. Good morning. All right.

12 Now for Alta, who do we have appearing?

13 MS. PULLIAM: Good morning, Judge. My name is
14 Jessica Pulliam from Baker Botts, and I'm here with my
15 colleagues, John Lawrence, and my brain trust, Kristie
16 Wallace.

17 THE COURT: That's quite a compliment.

18 MS. PULLIAM: I may need her.

19 THE COURT: Okay. All right.

20 Do we have any appearances for the Plaintiff
21 Debtor, Wattstock?

22 MR. BERGHMAN: Good morning, Your Honor. Thomas
23 Berghman with Munsch Hardt, Debtor's counsel. Just
24 observing.

25 THE COURT: Okay. Thank you.

1 MR. BERGHMAN: Good morning.

2 THE COURT: All right. Well, we have two hours on
3 our calendar estimated for this. Let me just double check
4 that for planning purposes. Is that, you think, what you
5 each need, an hour each? Or was that just sort of a plug
6 number?

7 MR. LEGRAND: Your Honor, I believe we'll be done a
8 little bit early. I don't suspect we'll need a full hour.

9 THE COURT: Okay.

10 MR. LEGRAND: I'm not sure if Alta's counsel feels
11 the same way, but --

12 MS. PULLIAM: I hope so.

13 THE COURT: Okay.

14 MS. PULLIAM: I've learned not to make guarantees
15 in --

16 THE COURT: Okay.

17 MS. PULLIAM: -- these matters, but --

18 THE COURT: Okay.

19 MS. PULLIAM: -- we'll strive to give you back some
20 time.

21 THE COURT: Okay. Good deal.

22 MS. PULLIAM: There's a lot of issues, so we'll do
23 our best.

24 THE COURT: All right. Well, and I do have a 12:00
25 noon conference call. So I'll just ask the law clerk, Bob,

1 let us know if someone has approached an hour, and then I'll
2 probably say wrap it up here pretty quick. Okay?

3 MR. LEGRAND: Absolutely.

4 THE COURT: Not hard and fast, but goals, let's
5 say.

6 All right. Well, are there any housekeeping
7 matters before I hear your arguments?

8 MR. LEGRAND: Yes, Your Honor. We have a
9 presentation, a deck. We have hard copies, as well as an
10 electronic copy. I'm not sure what Your Honor's preference
11 is, but we certainly can provide both or either.

12 THE COURT: All right.

13 MR. LEGRAND: What's convenient.

14 THE COURT: Well, I'd love a hard copy, and then
15 we'll -- I presume you're going to bring it up on the screen.

16 MR. LEGRAND: Yes, Your Honor. May I approach?

17 THE COURT: Uh-huh. You may. You can hand it to
18 me. Thank you.

19 All right. Well, if there are no other
20 housekeeping matters, I'll hear GE's argument.

21 MR. LEGRAND: Thank you, Your Honor.

22 THE COURT: I'm going to call your client "GE" for
23 shorthand, if that's okay. I know there are a lot of GE
24 entities.

25 MR. LEGRAND: That's perfect, Your Honor.

1 THE COURT: Okay.

2 MR. LEGRAND: May it please the Court?

3 THE COURT: Mm-hmm.

4 MR. LEGRAND: The third-party petition acknowledges
5 that Alta did not have a contract with GE, that GE insisted
6 that Alta contract directly with Wattstock, and that the
7 memorandum of understanding expressly disclaims any
8 partnership or agency relationship between Wattstock and GE.
9 Those allegations are fatal.

10 As a matter of law, Alta cannot hold GE vicariously
11 liable for Wattstock's conduct, or even directly liable on
12 the fraud-based claims it advances. Alta's vicarious
13 liability claims invoke the partnership by estoppel doctrine,
14 joint enterprise liability, and principles of agency and
15 ostensible agency.

16 Alta's claims fail as a matter of law, as we
17 explain in our briefing, because it did not extend credit to
18 a partnership. It cannot allege a community of pecuniary
19 interest. And it pleaded itself out of Court by
20 incorporating the MOU, the "Memorandum of Understanding," by
21 reference into its complaint.

22 Any reasonable diligence would have revealed what
23 the MOU memorializes. There was no partnership or agency
24 relationship between GE and Wattstock. Alta's fraud-based
25 claims fail as a matter of law for a similar reason. Alta

1 cannot allege that it justifiably relied on or exercised
2 reasonable diligence to investigate any of the vague
3 statements it alleges GE/Wattstock made about being partners.
4 Alta's claims against GE should be dismissed.

5 Your Honor, we've organized our argument today kind
6 of along these lines, starting first with reviewing Alta's
7 allegations and claims against GE. Then I'll address the
8 vicarious liability claims, and then the direct claims. And,
9 Your Honor, taking my obligation to mentor and provide
10 opportunities to train younger lawyers, if Your Honor gives
11 me permissions, we'd like Ms. Patel to argue the last point
12 related to consequential damages.

13 THE COURT: Okay. That's fine.

14 MR. LEGRAND: Starting with Alta's allegations and
15 claims against GE, the dispute really is about three
16 contracts. Two between Alta and Wattstock, and one between
17 Wattstock and GE. Alta and Wattstock entered into a Master
18 Agreement on February 27th, 2019. They later entered into a
19 Limited Notice to Proceed Proposal on December 23rd, 2019.

20 In Footnote 1 of their opposition to our motion for
21 judgment on the pleadings, Alta calls the LNTP a "definitive
22 agreement related to the scope, terms, and price of Alta's
23 purchase of the turbine units." So the LNTP is the
24 definitive agreement here.

25 In February of 2020 -- February 5th, 2020, Alta and

1 Wattstock later amended their master agreement. Now, Alta
2 admits, as it must, that GE was not a named party or
3 signatory to the Alta/Wattstock contracts. Indeed, according
4 to Alta, GE insisted that Alta contract directly with
5 Wattstock.

6 Now, the third relevant contract to this dispute is
7 the memorandum of understanding, the MOU. And that -- that
8 contract, that memorandum of understanding is between
9 Wattstock and GE. It was executed years earlier on June
10 26th, 2017.

11 Now, Alta acknowledges that the MOU "outlines" the
12 relationship between Wattstock and GE. And they concede --
13 Alta concedes that the MOU expressly contains this no
14 partnership or agency provision. Despite that admission,
15 Alta seeks to hold GE liable under the Alta/Wattstock
16 contracts for Wattstock's failure to deliver certain used
17 aeroderivative gas turbines at certain price points.

18 It also seeks to hold GE liable on these fraud-
19 based claims based on GE's refusal to step in and fulfill
20 Wattstock's obligations after Wattstock became insolvent.

21 We think the chronology here is very important
22 because it shows why Alta's claims are not plausible. After
23 Alta and Wattstock entered into the Master Agreement, a
24 representative from Wattstock in February of 2019 traveled to
25 Turkey to begin inspections and negotiations on used

1 turbines. In July of 2019, GE sent a letter to Alta,
2 providing further clarification of the GE/Wattstock
3 relationship. That letter expressly references the MOU. As
4 I mentioned in December of 2019, the LNTP was executed
5 between Alta and Wattstock, and Alta alleges that the LNTP
6 guaranteed a not to exceed price of \$6.5 million for the
7 Turkish units.

8 Then Alta paid \$750,000 on December 24th, 2019, and
9 then another \$750,000 in January of 2020. In February of
10 2020, around the time that Alta and Wattstock amended their
11 master agreement, the Turkish company apparently disclosed
12 certain termination fees to Alta that had to be paid to GE
13 for these turbines. According to Alta's allegations in the
14 spring of 2020, Alta nevertheless asked GE to step in and
15 fulfill Wattstock's obligations under the contract, and GE
16 refused to do so.

17 Alta asserts five causes of action against GE.
18 Count I seeks a declaration that GE and Wattstock are
19 "principal agent or partners." Count II is for respondeat
20 superior, and it is based on principles of ostensible agency
21 and estoppel. And Alta acknowledges that the MOU has this no
22 partnership or agency provision. But they, in a conclusory
23 fashion, label that provision a sham or subterfuge, designed
24 to conceal the true legal status of GE and Wattstock.

25 Count IV is for unjust enrichment in the amount of

1 \$1.5 million. Count VII is for fraud. And it appears to be
2 based on representations made by GE and Wattstock, related to
3 the nature of their relationship in pricing of these units.
4 And Count VIII is for negligent misrepresentation in the
5 alternative. And then finally, as I mentioned, one of the
6 issues that we've teed up in our 12(c) motion is this issue
7 of consequential damages, because it appears, at least from
8 our reading of the third-party petition, that Alta is seeking
9 consequential damages.

10 Just to quickly go over the procedural history,
11 Your Honor. The case began when Wattstock actually sued Alta
12 in state court for breach of contract. After Wattstock and
13 Alta engaged in some party discovery, Alta filed its third-
14 party petition, bringing GE into the case. GE did file a
15 motion to dismiss under Texas Rules of Civil Procedure 91A,
16 while the case was in state court, and that was denied on May
17 18th of 2021. But after Wattstock filed its Chapter 11
18 petition, and this case was removed, the parties negotiated a
19 proposed scheduling order that specifically contemplated
20 dispositive motions, including a motion to dismiss.

21 And at no point since the parties discussed the
22 schedule or proposed -- or tendered a proposed scheduling
23 order has Alta sought leave to amend its petition or tendered
24 a proposed amendment.

25 So to turn first to Alta's vicarious liability

1 claims, I want to start with the agency and ostensible agency
2 arguments. Now, Alta seeks a declaration, as I mentioned,
3 that GE and Wattstock were "principal/agent or partners."
4 The third-party petition, in summary fashion, also claims an
5 "ostensible agency existed between Wattstock and GE."

6 As an initial matter under Texas law, when partners
7 are known to the contracting parties, but the contract is
8 entered into by one partner only, the non-signatory partner
9 is not bound by that contract.

10 We cited, for example, in our briefing the *Mayers*
11 v. *Addison Brown* case. We think it is directly on point from
12 the Northern District of Texas.

13 In that case, the plaintiff contracted with a third
14 party, Addison Brown, for an oil and gas lease. The
15 plaintiff claimed that the defendant, Comstock, and the third
16 party, Addison Brown, represented during the negotiations
17 that they were partners. The Court dismissed the plaintiff's
18 claims for agency and partnership by estoppel at the motion
19 to dismiss stage, because the equitable and estoppel
20 principles did not apply where the defendant signed the
21 contract in individual name only.

22 *Mayers*, frankly, Your Honor, should end the inquiry
23 here. But Alta's vicarious liability claims also fail as a
24 matter of law because it cannot allege or show the type of
25 control necessary to find a principal/agent relationship

1 between GE and Wattstock.

2 Agency requires control such that the agent isn't
3 free -- is not free to do the work in his or her own way. The
4 Intel case, we think, is instructive. In that case, which
5 involved the vicarious liability claim against certain labs
6 and facilities based on physician's use of allegedly patent-
7 infringing video conferencing technology, the Southern
8 District of Texas found no agency, despite the fact that
9 defendants required the physicians to comply with medical
10 standards, to be available on call at certain times, to carry
11 insurance, and to perform their jobs.

12 And, in fact, the labs and facilities exercised
13 certain oversight in tracking over the physicians' day-to-day
14 operations as well.

15 Now, Alta alleges that the MOU outlines the
16 relationship between Wattstock and GE, and it shows that GE
17 was in "complete control" of Wattstock. Now, we don't
18 believe that conclusory allegation is entitled to any weight
19 under the federal pleading standards. And more importantly,
20 it's directly contradicted by the memorandum of understanding
21 that is incorporated by reference into Alta's complaint.

22 As I mentioned, the MOU has this express, no-
23 partnership or agency provision, but it also has a provision
24 in that same section of the agreement that says neither party
25 shall be obligated to purchase or sell any equipment, parts,

1 or services under the MOU. So GE and Wattstock have this MOU
2 that exists years before the Alta and Wattstock relationship.
3 That MOU expressly says no partnership or agency
4 relationship. And it also expressly says that GE can't force
5 Alta to sell certain equipment and vice versa. There's no
6 obligation under the MOU to sell any equipment or provide any
7 services pursuant to the MOU.

8 Alta can't manufacture a plausible claim for relief
9 by misreading or misrepresenting documents that are expressly
10 incorporated by reference into its complaint. Now, in its
11 opposition to our motion, Alta argues that the July 31st,
12 2019 letter that GE sent Alta also shows complete control.
13 But that letter simply describes the general business
14 relationship between GE and Wattstock that's memorialized in
15 the memorandum of understanding.

16 And in fact, the letter expressly references the
17 memorandum of understanding. And again, going back to the
18 chronology, this letter was sent in July of 2019, months
19 before the LNTP, which Alta concedes is the definitive
20 agreement related to its purchase of these gas turbine units,
21 months before the LNTP was executed.

22 And in any event, tracking daily progress and
23 conducting oversight of Wattstock's work does not come close
24 to the type of control that is necessary to show an agency
25 relationship. It's not even remotely close to the type of

1 control that was at issue in *Intel*, where the Court had no
2 trouble finding -- no agency as a matter of law.

3 This is no different than setting the "basic
4 parameters" for work to be done, and overseeing and tracking
5 that work based on those parameters. That was exactly what
6 was at issue in the *Intel* case.

7 Alta also claims that GE is liable for Wattstock's
8 alleged breach of contract and torts based on the ostensible
9 agency doctrine. The doctrine is based on principles of
10 equity, and it requires proof of a reasonable belief and an
11 agent's authority, and justifiable reliance on
12 representations of that authority by the principal. So only
13 the conduct of the principal is relevant to ostensible
14 agency.

15 In other words, the Plaintiff must allege and prove
16 that it did what a reasonably prudent person, using diligence
17 and discretion would do to ascertain the agent's authority.

18 Alta, for its part, doesn't allege any diligence
19 whatsoever, let alone any reasonable diligence, nor can it,
20 as its complaint completely undermines any argument about
21 diligence.

22 But the complaint expressly references or admits
23 that the MOU outlines the relationship between GE and
24 Wattstock. The complaint admits that GE refused to be a
25 party to the contracts between Alta and Wattstock, and that

1 GE is not a party to any contract directly with Alta.

2 The complaint also incorporates that July 2019
3 letter by reference. And that letter expressly references
4 the MOU. And the MOU, as we know it, contains that no
5 partnership or agency provision. So any diligence -- any
6 reasonable diligence conducted by Alta, or conducted by
7 someone acting as a reasonably prudent person, would have
8 simply revealed what the MOU memorializes. There was no
9 partnership or agency relationship between GE and Wattstock.

10 I turn now to the partnership and partnership by
11 estoppel theories that also appear to be a basis for Alta to
12 seek to hold GE liable for Wattstock's conduct. Now, in its
13 opposition to our motion, Alta concedes that GE and Wattstock
14 were not legally partners. There was no legal partnership
15 relationship between the two entities. So Alta points to a
16 straight reference to the word estopped in the third-party
17 petition at paragraph 110 to argue that GE is vicariously
18 liable for Wattstock's conduct under the partnership by
19 estoppel doctrine.

20 That one reference to estopped, is it -- that's the
21 sum total of Alta's allegations related to the partnership by
22 estoppel doctrine. Now, partnership by estoppel, like
23 ostensible agency, requires a showing of due diligence. But
24 it also requires a plaintiff to allege, and ultimately prove,
25 that it extended credit to a partnership. Alta cannot

1 plausibly plead due diligence, or diligent -- reasonable
2 diligence under the partnership by estoppel doctrine, for all
3 of the same reasons it cannot do so under the ostensible
4 agency doctrine.

5 We cite, for example, the *Lost Maples* case. In
6 that case, a debtor signed a contract with a creditor to
7 purchase an ice machine from a supplier. The supplier never
8 delivered. After the creditor sued the debtor for not making
9 payments under the contract, the debtor tried to invalidate
10 that contract under the partnership by estoppel doctrine,
11 arguing that the contract failed for lack of consideration
12 because the ice machine was never delivered.

13 The Court held that the debtor's claim failed for
14 lack of due diligence because the relevant contracts
15 contained a no partnership or agency provision, just like the
16 MOU between GE and Wattstock here.

17 Now, in its opposition, Alta argues that it did not
18 see the MOU until discovery in this case. Now, that's not an
19 allegation in its complaint. In fact, the complaint
20 expressly incorporates the MOU by reference. But more
21 importantly, Alta doesn't allege that it was unaware of the
22 MOU, or that it asked for the MOU and was denied access to
23 it, or that it did anything, as I mentioned, to investigate
24 the true legal relationship between Wattstock and GE.

25 Alta's partnership by estoppel claims also fails as

1 a matter of law because Alta cannot allege that it extended
2 credit to a partnership. Alta alleges it made two \$750,000
3 payments for long lead hardware engineering activities and
4 preliminary drawings. It does not allege, and it cannot
5 allege, that it extended credit or it made a loan or
6 investment to the partnership, or to the putative
7 partnership, that it expected to be repaid.

8 And this element of the partnership by estoppel
9 doctrine we think is critically important. The doctrine
10 really is about protecting creditors who rely on the
11 reputation of one putative partner to extend a loan on the
12 belief that that, you know, highly regarded putative partner
13 will make sure that that loan is repaid.

14 We cite, for example, the CCR case which involved a
15 plaintiff who hired a law firm for a debt offering, but that
16 never materialized. The plaintiff tried to hold the
17 individuals associated with the law firm liable under the
18 partnership by estoppel doctrine based on these marketing
19 representations, marketing materials that suggested that the
20 law firm was organized as a partnership.

21 And the Court held that the partnership by estoppel
22 doctrine was "inapplicable because the plaintiff never
23 extended credit to the partnership." The dispute was about a
24 service contract. Our dispute here is about a service and
25 products contract, not a credit agreement.

1 Alta's last theory of vicarious liability is based
2 on law of joint enterprise liability. Here again, Alta
3 concedes in its opposition that Wattstock and GE were not
4 legally in an actual joint venture. Instead, pointing back
5 to that same paragraph 110, where they had that reference to
6 estopped, Alta argues that it is seeking to hold GE liable
7 under the joint enterprise theory, or joint enterprise
8 liability theory.

9 Now, to pursue a claim for joint enterprise
10 liability, Alta must plausibly allege that GE and Wattstock
11 have a "community of pecuniary interests and a specific,
12 common purpose."

13 Alta must also plead plausibly that both GE and
14 Wattstock have an equal right of control over the enterprise
15 or project at issue. It cannot satisfy either requirement as
16 a matter of law.

17 Alta does not and cannot allege a community of
18 pecuniary interests. As Alta's opposition brief concedes, it
19 must plausibly allege that GE and Wattstock pooled their
20 profits or assets related to the particular project. Alta
21 argues in its opposition that the factual details of the
22 financial relationship are within GE and Wattstock's
23 exclusive possession. You know, that's sufficient as a
24 matter of pleading, and frankly, it's demonstrably false as a
25 matter of judicial notice.

1 We cited, for example, Wattstock's statement of
2 financial affairs, Docket Entry 50, that shows no such thing,
3 no such relationship where GE is in control, or has sharing
4 or pooling of assets with Wattstock.

5 We cited the case of *St. Joseph's Hospital v.*
6 *Wolff*, the Supreme Court of Texas. And that case made clear
7 that a general interest in a common endeavor, or a, you know,
8 common business interest is not enough under the joint
9 enterprise or joint venture liability theory.

10 That case involved an integrated, medical residency
11 program, organized by a hospital and a foundation. A medical
12 resident's negligence caused severe injuries to the
13 plaintiff, and the plaintiff sought to hold the hospital and
14 the foundation liable for that negligence. The court -- the
15 Texas Supreme Court found that the joint enterprise theory
16 didn't apply because there was no pooling or sharing of
17 assets or profits between the hospital and the foundation,
18 specifically related to the residency program.

19 Alta also cannot plausibly plead that GE and
20 Wattstock had an "equal right of control over the
21 enterprise." Alta pleads itself out of court by alleging,
22 what we think in a conclusory fashion, but alleging
23 nonetheless, that GE was in "complete control" of Wattstock.

24 More importantly, there's no allegation, and Alta
25 cannot plausibly allege that Wattstock had any control over

1 GE. The *Triplex* case -- we cite the *Triplex* case, which is
2 another Texas Supreme Court case. That case involved a Dram
3 Shop Act claim against a bar and a radio station for
4 overserving patrons who injured police officers while
5 driving.

6 The radio station had advertised "ladies' night" at
7 this bar. And the bar had actually used a DJ from the radio
8 station during some of these events. The Texas Supreme Court
9 held that no joint enterprise liability could be found there
10 because there was no equal right of control.

11 The bar had "complete control over who to serve,
12 what to serve, and how much to serve." And more importantly,
13 there was no evidence that the bar had any control over the
14 radio station. That's exactly the circumstance that we have
15 here.

16 Alta is alleging, again in a conclusory fashion,
17 that GE had complete control over Wattstock, but they had no
18 allegations whatsoever that Wattstock had control or an equal
19 right of control over GE.

20 I'll turn now to Alta's direct claims against GE.
21 Alta's direct claims against GE are all, we think, grounded
22 in fraud. Therefore, specifically for fraud, negligent
23 misrepresentation, unjust enrichment. But as alleged, each
24 are predicated on some allegedly false statement or
25 misrepresentation made by GE/Wattstock that Alta claims they

1 had relied on.

2 Fraud requires justifiable reliance and Alta cannot
3 plead justifiable reliance as a matter of law. As an initial
4 matter, as we point out in our briefing, Alta's fraud-based
5 claims are woefully insufficient as a matter of pleading for
6 two reasons.

7 First, Alta engages in these impermissible group
8 pleadings. By our count, there are over 100 references to
9 GE/Wattstock, Wattstock/GE, or some iteration of that phrase
10 or term in Alta's third-party petition.

11 But Alta also fails to plead with particularity the
12 who, what, when, where, and why of the alleged fraud. The
13 allegations about GE/Wattstock's representation simply do not
14 reasonably support an inference of fraud.

15 Alta's fraud-based claims appear to be based, at
16 least on our reading of the complaint, on GE/Wattstock's
17 alleged representations about being partners. But as we
18 explained in our briefing, Texas courts have long recognized
19 that the term partner is ubiquitously used in the business
20 context.

21 So Alta must plausibly plead that GE and Wattstock
22 were not simply using the work colloquially. It has not done
23 so and it cannot do so. There -- they don't allege the type
24 of detail or specificity that would show, for example, that
25 when Wattstock and GE said we're partners, they meant it in a

1 legal sense. There's no allegation, for example, that -- you
2 know, when the parties were at the negotiating table, getting
3 ready to execute the contract, GE said, you know, don't worry
4 about it. We're Wattstock's partner, so we're not going to
5 sign this agreement, but you have our word. We're going to
6 be right there in case we need to be, because we're partners.
7 I mean, that's not the allegation. It's just these general
8 references to being partners.

9 And the Texas Supreme Court has expressed extreme
10 skepticism about using the term partner to mean something
11 other than just the colloquial -- you know, in the colloquial
12 business sense.

13 Now, Alta's fraud-based claims also appear to be
14 based on representations by GE/Wattstock about their ability
15 to refurbish used gas turbines at competitive prices. Alta
16 alleged that GE/Wattstock hid the existence of undisclosed
17 liabilities on virtually all of these used turbines. I think
18 they call it a bait-and-switch maneuver. The bait and switch
19 doesn't really work here because again, if you look at the
20 chronology, the LNTP, which was the definitive agreement
21 according to Alta for its purchase of these turbines, that
22 LNTP was executed after, obviously, the MOU was signed
23 between GE and Wattstock, and after this letter was sent in
24 July of 2019 that expressly referenced that MOU.

25 But nonetheless, Alta's allegations about this --

1 these misrepresentations related to price don't reasonably
2 support an inference of fraud. Alta's complaint points, for
3 example, to the Nuh Cemento units covered by the LNTP. Alta
4 alleges that the LNTP included a not to exceed price of \$6.5
5 million, and that it also claims that in February of 2020,
6 Nuh Cemento disclosed or someone disclosed for the first time
7 the existence of this \$1.4 million in termination fees that
8 had to be paid to GE.

9 The LNTP, however, again incorporated by reference
10 into Alta's complaint. That LNTP does not include a not to
11 exceed price of \$6.5 million. Instead, it sets the price of
12 the two Nuh Cemento units for a combined \$8.125 million. And
13 it makes clear that the proposal, the LNTP proposal, the
14 total purchase price of nearly \$20 million is based on an
15 assumption that those units could be purchased at that \$8.125
16 million price.

17 So Alta saw this in its contract, in the LNTP in
18 December of 2019 and signed it. Then, despite these supposed
19 hidden liabilities on the Nuh Cemento units coming to light
20 in February of 2020, Alta alleges in the spring of 2020, it
21 was "ready, willing, and able to go forward with the Nuh
22 Cemento project with GE alone."

23 So in addition to falling sort of far short of
24 alleging that -- you know, with particularity the who. Like,
25 which individual at GE made what representation about being

1 partners is the legal sense, or that could reasonably be
2 interpreted to mean legally partners, and in what context,
3 and on what days. The allegations just simply do not
4 reasonably support an inference of fraud.

5 And setting aside the pleading deficiency issues,
6 Alta's fraud-based claims fail for a more fundamental reason.
7 Alta cannot plead or prove justifiable reliance as a matter
8 of law. Again, going back to the LNTP, which is the
9 definitive agreement here, that LNTP conclusively negates
10 reliance.

11 On Section 33.1 of the LNTP makes clear that Alta
12 "has not relied on or been induced by any representations not
13 contained in the contract."

14 The Texas Supreme Court made clear in the
15 *Schlumberger Tech* case that parties may negate fraud-based
16 claims by specifically disclaiming reliance in a merger
17 clause. That's exactly what we have here. We also cited the
18 *DT Apartment* case from Northern District of Texas that
19 dismissed fraud-based claims where the relevant contract
20 included a disclaimer of reliance on any representations pre-
21 dating that agreement.

22 In addition to the merger clause which, again,
23 conclusively negatives reliance, Alta's fraud-based claims
24 fail as a matter of law because multiple red flags warned
25 Alta away from relying on these alleged misrepresentations

1 about Wattstock and GE being partners. The red flags should
2 have warned them away from interpreting or construing those
3 alleged representations as meaning their legal partners.

4 We cited the *JPMorgan Chase vs Orca* case. That
5 involved an oil and gas lease or contract where the defendant
6 represented that certain tracks were open, but had already
7 leased those tracks to someone else. That earlier party that
8 had leased the tracks delayed reporting those leases in the
9 property records. And when the plaintiff went to go record,
10 the plaintiff learned about these earlier leases.

11 The parties' contract in that case had a negation
12 of warranty clause that shifted the risk of failure, title
13 failure to the plaintiff. The Court found justifiable
14 reliance negated as a matter of law because the parties were
15 "sophisticated," even though the defendant was a "newly
16 formed company." The transaction was large. It involved
17 \$3.2. Our case involves nearly \$20 million. And the
18 defendant made certain statements about uncertainty related
19 to the track being open. And the plaintiff could have
20 checked and, in fact, was checking the property records
21 periodically, but ultimately stopped checking those records
22 before closing the transaction and the Court found that the
23 plaintiff could not show diligence because of these red
24 flags.

25 Red flags abound in our case based solely on the

1 allegations in Alta's complaint.

2 First, the Alta/Wattstock contracts were red flags.

3 Again, at GE -- Alta alleges that GE insisted that Alta
4 contract directly with Wattstock. And the contracts that
5 Alta and Wattstock signed do not name GE as a party, do not
6 reference GE by name, do not seek or require GE's consent or
7 approval or permission to execute the agreements. They don't
8 contain any provision even remotely suggesting that GE
9 intended to be bound by the Alta Wattstock contracts.

10 And they were signed on February 27th, 2019 --

11 December 23rd of 2019 and then amended in February of 2020.

12 At any point over that timeline, Alta could have insisted, if
13 it believed that GE was going to be liable under these
14 contracts, Alta could have insisted that GE be named or at
15 least expressly referred to by name in these contracts, and
16 it did not do so. So those should have been red flags that
17 warned Alta away from believing, from reasonably believing
18 that when GE and Wattstock allegedly said they were partners,
19 they meant that they were legal partners.

20 And the contracts, the Alta Wattstock contracts are
21 important because they also memorialize the fact that Alta
22 and Wattstock were sophisticated parties both represented by
23 counsel, just like the Texas Supreme Court cases that I've
24 mentioned, the *Orca* case. When you have sophisticated
25 parties represented by counsel, you know, that counts as a

1 red flag.

2 And to make matters worse, the Alta Wattstock
3 master contract actually has a no partnership or agency
4 provision in it, too. And so you would think that
5 sophisticated parties represented by counsel, sitting at the
6 negotiating table, talking about who is going to be liable
7 under a contract, who has certain obligations in the contract
8 they're negotiating and they say, hey, we're -- this contract
9 is not going to create any agency or partnership
10 relationship, that that wouldn't raise any red flags for
11 sophisticated counsel to think, oh, there's this other third
12 party, GE. I wonder if they have a similar no-partnership or
13 agency provision that governs their relationship. And that's
14 a massive red flag that, again, Alta incorporates by
15 reference into its complaint because it relies on the master
16 agreement.

17 As we've already discussed, we know that the MOU
18 between Wattstock and GE had a similar no agency or
19 partnership provision and that was a massive red flag as
20 well.

21 Now at Page 15 of its opposition brief, Alta
22 suggests that it had no knowledge, that's what it suggests,
23 although it doesn't come outright and say it. It had no
24 knowledge of the MOU until discovery in this case. Now
25 that's in its opposition brief, again, not actually in its

1 complaint.

2 As we already explained, we don't believe or we
3 believe Alta did not put that in its complaint and can't put
4 that in its complaint for good reason, because the July 31st,
5 2019 letter which predates the LNTP, expressly references the
6 memorandum of understanding. Now Alta calls this letter a
7 smoking gun. We actually agree. It is a smoking gun, but
8 not for the reason that Alta claims. It's a smoking gun
9 because it shows that Alta was on notice about the memorandum
10 of understanding before it executed the LNTP.

11 So all of these red flags, including that letter,
12 show that Alta cannot plausibly plead that it exercised any
13 reasonable diligence to avoid negation of reliance as a
14 matter of law.

15 And just, again, Alta's complaint is completely
16 devoid of any allegations related to any diligence, much less
17 any reasonable diligence.

18 I'll just quickly address the negligent
19 misrepresentation claim. That's Count VIII. As a separate
20 and independent bar to that claim, we've invoked the economic
21 loss rule. It's pretty clear that you can't assert a
22 negligent misrepresentation claim to try to seek the same
23 damages that you're seeking in the contract, and that's
24 exactly what Alta has done here. So we believe the economic
25 loss rule bars Alta's negligent misrepresentation claim.

1 And, finally, just turning to the unjust enrichment
2 claim, very quickly, we believe it's -- the allegations
3 related to unjust enrichment are impermissibly vague. The
4 allegation at 125 of the third-party petition says that GE
5 has been unjustly enriched in the amount of \$1.5 million.

6 Again, looking at the complaint and the documents
7 incorporated by reference in the complaint, Alta paid -- made
8 two \$750,000 payments in December of 2019 and January of
9 2020. The LNTP, that is the contract that was executed in
10 December of 2019 actually requires two \$750,000 payments upon
11 execution of the LNTP by the parties. It refers to Article
12 VII for the payment terms, and Article VII lists those two
13 \$750,000.

14 Now in its opposition Alta argues that it's seeking
15 the \$1.5 million it paid for hardware and drawings it never
16 received. Its complaint also references some hardware
17 engineering activities and preliminary drawings that GE
18 allegedly needed to be paid for, but also doesn't allege that
19 it made any payment directly to GE and its opposition
20 acknowledges that it doesn't allege that.

21 But, more importantly, Alta does not allege how GE
22 was unjustly enriched or why it would be unconscionable for
23 GE to retain the benefit it allegedly received from
24 Wattstock.

25 Alta's opposition doubles down on this fraud

1 theory. But as I've already explained, Alta's fraud claims
2 fail as a matter of law. And because the unjust enrichment
3 claim is based on fraud, the unjust enrichment claim should
4 be dismissed as well.

5 Unless the Court has any questions for me, I'll
6 turn it over now to my colleague, Ms. Patel.

7 THE COURT: I do have two or three questions.

8 First, a very basic procedural question. I did
9 note in preparing that the State Court had heard and denied a
10 GE motion to dismiss that first took me aback, like why are
11 we here again. But as I understand it, it's Rule 9 that made
12 you come forward again. There's not the same requirement of
13 pleading fraud with particularity in the State Court system.

14 Is --

15 MR. LEGRAND: That's exactly right, Your Honor.

16 THE COURT: Uh-huh.

17 MR. LEGRAND: And I think Alta concedes in its
18 opposition brief that there is no analog in State Court to
19 Rule 9.

20 THE COURT: Okay.

21 MR. LEGRAND: I would also point the Court to Rule
22 81 and Rule 12(h).

23 Rule 81 says that the federal rules apply to remove
24 actions. Now they certainly don't have an obligation to
25 replead unless their pleadings are challenged. Rule 12(h)

1 allows us to bring a motion for failure to state a claim at
2 any time, including at trial or in a 12(c) motion.

3 So after the pleadings have closed -- the *DT Apartment* case that we cite I think is also instructive here.
4 After the pleadings close, if the Court can resolve a case on
5 the pleadings, that's what 12(c) is designed for. And all
6 we're basically saying is that they haven't, you know,
7 alleged a claim. They've failed to state a claim for which
8 relief can be granted.

10 THE COURT: Uh-huh. All right.

11 My next question is what do you say about this, the
12 fact that there are so few documents here, I guess three,
13 really. I mean, I know there's the letter and, you know,
14 website snapshots and whatnot. But, I mean, we're really
15 just talking about the memorandum of understanding between
16 Wattstock and GE, and then the Alta master agreement with
17 Wattstock and then the, what you call the LNTP.

18 Do you think I am correct in worrying, the fact
19 that there are so few documents is back -- actually, a bad
20 fact for GE in this motion to dismiss. It suggests to me
21 that there might need to be discovery to see what other, you
22 know, conduct or other pieces of paper there might be out
23 there that go to their claims.

24 MR. LEGRAND: I don't think so at all for a couple
25 of reasons.

1 First, as I mentioned, when the case was in State
2 Court Alta and Wattstock did engage in some discovery. Since
3 the case has been removed, GE and Alta have engaged in
4 discovery. Now I know Alta raises these unripe, and we think
5 non-existent discovery disputes, but we've been producing
6 documents.

7 But more importantly, Your Honor, Alta's claims are
8 barred as a matter of law. All right. We're not saying --
9 our arguments aren't that they -- their -- they fail to
10 allege things that they can allege. Our arguments are
11 basically like if you look at the documents that they've
12 incorporated by reference into their complaint, their claims
13 fail as a matter of law. And they can't possibly be -- I'll
14 let my friend on the other side tell me she disagrees. But
15 they can't possibly allege, for example, that they extended
16 credit to a partnership for joint -- for partnership estoppel
17 doctrine applied or that GE and Wattstock shared assets or
18 pooled their profits for joint enterprise liability to apply.

19 I mean, so we think the lack of documents expressly
20 referenced in -- by -- incorporated by reference into the
21 complaint isn't a problem for us because, again, over the
22 last four and a half months at any point Alta could have
23 tendered or forwarded them in a complaint based on the
24 documents that they've received in discovery, both from the
25 State Court and since the case has been removed, and they've

1 failed to do so. I mean, their third-party petition
2 expressly refers to this MOU that they got in discovery in
3 the State Court.

4 THE COURT: Okay. What about the factual
5 allegations dangled out there about the co-location. That's
6 not a legal term of art. But, you know, as I interpreted the
7 complaint, it meant that Wattstock and GE operated out of a
8 common location and, you know, they dangle out there that
9 Wattstock is comprised of former GE executives. GE didn't
10 want to do this in-house.

11 So, I mean, the true package concept that was --
12 you know, this is why you should go with us because we have
13 this arrangement with GE. I mean, that makes me
14 uncomfortable that there are facts here that need to be
15 further explored maybe.

16 MR. LEGRAND: Right.

17 Well, Your Honor, I would point the Court to the
18 Texas Supreme Court cases that we cited, for example, *St.*
19 *Joseph and Triplex.*

20 THE COURT: Uh-huh.

21 MR. LEGRAND: The Texas Supreme Court has expressed
22 extreme skepticism about finding or applying these equitable
23 principles of vicarious liability based on even the sharing
24 of location, the sharing of employees, et cetera by itself
25 because otherwise any time, for example, you have a lessor

1 and a lessee, you could potentially impose vicarious
2 liability because there's an agreement.

3 Now Alta doesn't allege why, for example, Wattstock
4 was co-located in the same Jacintoport facility. I'm sure
5 they know, you know, there was an arrangement. But it goes
6 back to the point. I think the Texas Supreme Court is
7 saying, like there has to be some line drawing here. Right.
8 We don't want every single business that does or every single
9 company that does business with another company to be liable
10 for whatever the other company does under these equitable
11 principles.

12 And so the joint enterprise liability doctrine,
13 partnership by estoppel, agency, a ostensible agency, they
14 have those very specific elements that are required to be
15 alleged and proved to draw that line, to ensure that we're
16 not, you know, imposing liability on anyone essentially in
17 this -- in the chain of supply. And they specifically refer
18 to distinctions between, you know, employees versus
19 independent contractors or suppliers and saying that these
20 equitable principles traditionally or typically don't apply
21 to subcontractors or suppliers in the chain.

22 THE COURT: Okay. So, to summarize, you don't
23 think they've dangled enough out there in their complaint to
24 live another day on the issue?

25 MR. LEGRAND: I don't, Your Honor.

1 THE COURT: Okay.

2 MR. LEGRAND: And I don't think they can, I don't
3 think they can overcome the legal impediments to their
4 claims. Again, it -- you know, this -- I think this would be
5 entirely different -- going back to the *Mayer's* case, it
6 would be entirely different, for example, if, you know, GE
7 and Wattstock were at the negotiating table, you know, and GE
8 said, Wattstock is signing on our behalf, or Wattstock has
9 authority to sign for us, or the contracts expressly referred
10 to GE.

11 But as the *Mayer's* case makes clear, when you know
12 about an alleged partnership and one individual partner to
13 that alleged partnership signs a contract in its individual
14 name, that non-signatory is not bound by that contract. I
15 mean, that -- we have to be able to hold parties to their
16 contracts. Right. I mean, that's ultimately what we're
17 trying to do.

18 You had a contract with Wattstock. You admit and
19 allege in your complaint that GE refused to sign that
20 contract. You can't possibly hold GE liable for those
21 contracts.

22 THE COURT: Okay. Got it. Thank you.

23 MR. LEGRAND: Thank you, Your Honor.

24 THE COURT: All right. Ms. Patel, what were you
25 going to add?

1 MS. PATEL: Good morning, Your Honor.

2 THE COURT: Good morning.

3 MS. PATEL: Like Alta's other claims, Alta's claim
4 for consequential damages also fails as a matter of law
5 because Alta contractually waived consequential damages in
6 its agreement with Wattstock.

7 Article IX of the Wattstock/Alta master agreement
8 specifically limits consequential damages for all claims,
9 including fraud claims.

10 In fact, the first sentence of Section 9.1(b)
11 provides that "Notwithstanding any other provision of this
12 agreement and to the fullest extent permitted by law, neither
13 party or their respective officers, directors, partners,
14 employees, representatives, contractors or subcontractors
15 shall be liable to the other or shall make any claim for any
16 incidental, indirect or consequential damages arising out of
17 or connected in any way to this agreement."

18 This broad waiver, as you can see, applies to any
19 claim for any consequential damages arising out of or
20 connected in any way to the agreement.

21 The second sentence of Section 9.1(b) provides
22 further information about the waiver, but it in no way limits
23 that first sentence. The second sentence says, "This mutual
24 waiver of consequential damages shall include, but is not
25 limited to, any other consequential damages that either party

1 may have incurred from any cause of action."

2 Alta argues in its opposition brief that the second
3 sentence of this waiver limits consequential damage -- the
4 consequential damages waiver to the specific causes of action
5 enumerated at the end of the waiver. But Texas courts have
6 routinely held that waiver clauses with similar language and
7 composition, including this - including to or including but
8 not limited to language that Alta is concerned about should
9 be applied broadly and in conjunction with the rest of the
10 sentences in the waiver provision.

11 We've cited in our brief *Forest Oil and Biscamp*.
12 In both of those cases the Courts looked at similar waiver
13 provisions and read them as a whole rather than focusing on
14 specific words or every other word the way that Alta proposes
15 that we should focus on this waiver provision.

16 *Biscamp* especially is on point with our waiver
17 provision because it includes very similar language like the
18 including and including but not limited to language. There
19 the plaintiffs argue that because negligence was not
20 specifically enumerated in the waiver provision, the Court
21 should not waive the negligence claim.

22 There the Court looked at the waiver as a whole,
23 especially the language at the very beginning of the waiver
24 that said, any and all claims, and held that the waiver
25 provision actually excluded all liability and ended up

1 applying it to the negligence claim even though it was not
2 specifically enumerated in the waiver provision.

3 Here in our waiver provision we have very similar
4 language where the Court can see that we have the, any cause
5 of action, any claim, and to the fullest extent permitted by
6 law. This type of language is very similar to the language
7 in *Biscamp* that should be construed broadly to apply to any
8 claim in any cause of action.

9 And another reason why the Court should hold that
10 our reading of this waiver provision is the only reasonable
11 reading of this provision is because Alta's reading would
12 render meaningless the very first sentence of the waiver
13 provision. As we said, the very first sentence broadly
14 excludes any claim for any consequential damages arising out
15 of and connected in any way to this agreement.

16 Alta also argues that the damages waiver is not --
17 is vitiated by its fraud claim. Taken to its logical
18 conclusion, Alta's argument means that any time a plaintiff
19 brings a fraud claim, the Court cannot enforce a damages
20 waiver for consequential damages.

21 This is untrue. Courts -- the Texas Supreme Court
22 and other Texas courts can and do enforce waiver provisions
23 when a plaintiff brings a fraud claim or a fraudulent
24 inducement claim. Specifically, courts look at the nature of
25 the parties, whether they are sophisticated parties

1 represented by counsel. They also look to whether the
2 contract included a merger clause.

3 In *Forest Oil*, a case that we cite in our brief,
4 the Court looked at whether or not the parties had a merger
5 clause that specifically disclaimed reliance on extra
6 contractual representations. The Court held that because the
7 merger clause in the agreement, similar to our merger clause
8 in our agreement, specifically disclaimed reliance on
9 parties' extra contractual representations, that was
10 sufficient to prevent the fraudulent inducement claim from
11 vitiating the contract, and vitiating the waiver provision.

12 In sum, for all the reasons my colleague and I have
13 discussed today, and for all the reasons that we've argued in
14 our brief, this Court should grant General Electric's motion
15 for judgment on the pleadings.

16 THE COURT: All right. Thank you, Ms. Patel.

17 All right. We'll hear from Alta now.

18 MS. PULLIAM: See, my brain trust is already
19 helping.

20 THE COURT: You already need her.

21 MS. PULLIAM: She's reminding me that I may need to
22 give you a copy of our presentation.

23 THE COURT: All right. Very good. You may
24 approach.

25 MS. PULLIAM: May I approach?

1 THE COURT: Uh-huh.

2 MS. PULLIAM: Thank you, Your Honor.

3 THE COURT: Thanks.

4 Did you have an extra one for the law clerk, too?

5 MS. PULLIAM: I -- of course we do.

6 Thank you.

7 THE COURT: I can't remember.

8 Mr. LeGrand, did you have one --

9 MR. LEGRAND: I do have an extra --

10 THE COURT: -- of yours for the law clerk?

11 MR. LEGRAND: -- one, Your Honor.

12 May I approach?

13 THE COURT: Yeah. I should have thought of that
14 earlier. It was on the screen, though, so I didn't worry
15 about it. Yeah.

16 MS. PULLIAM: Thanks.

17 THE COURT: Thank you.

18 (Pause)

19 MS. PULLIAM: Okay.

20 THE COURT: Mine shows up here in case --

21 MS. PULLIAM: It does. Okay.

22 THE COURT: -- you were wondering. Yeah.

23 MS. PULLIAM: I was.

24 THE COURT: Okay.

25 MS. PULLIAM: May it please the Court? Thank you,

1 Your Honor.

2 I want to start with some general issues with
3 respect to motions to dismiss. As you just eluded in
4 questions to Mr. LeGrand, we are here on a motion to dismiss.
5 We are not here on a motion for summary judgment, nor are we
6 here after a jury trial like in many of the cases that were
7 cited to you.

8 So this is about the pleadings. We did start in
9 State Court actually before Baker Botts was involved in this
10 case, and there are different pleading standards, of course,
11 that apply in State Court.

12 We have been diligently seeking discovery from GE
13 for almost two years. We are awaiting more discovery from
14 GE. My co-counsel, our co -- Baker Botts' co-counsel in the
15 case has been handling the discovery issues. But my basic
16 understanding is that we still have yet to get documents that
17 resulted from agreed search terms run by GE. So the Court's
18 questions about documents that may be out there are very
19 present in our mind as well.

20 All that being said, the pleadings before the
21 Court, we believe, are sufficient to allege even under the
22 federal standards all of the causes of action that Alta has
23 put in its petition.

24 As the Court knows, the motion to dismiss standard
25 is a lenient one. I will certainly address Rule 9. But with

1 respect to anything but the causes of action to which Rule 9
2 applies, the fraud-based causes of action, the petition
3 needed only, even under federal standards, to raise a right
4 to relief above a speculative level. That's a pretty low
5 bar. And this Court certainly has the opportunity to
6 reexamine the causes of action at summary judgment and
7 certainly after trial.

8 So I know the Court is familiar with those
9 standards pretty intimately, but I think they were largely
10 ignored on the initial presentation. So I wanted to be sure
11 to raise that.

12 The other piece --

13 [To unknown] I'm not advancing, so I may need you
14 to -

15 (Pause)

16 MS. PULLIAM: So the other piece that -- I forgot
17 some notes here -- that I want to make clear at the outset is
18 there's certainly an effort by GE to make this case about the
19 three documents that you just mentioned. And this is -- you
20 know, you heard Mr. LeGrand say, this is a dispute about
21 three contracts. We don't agree with that at all, Your
22 Honor.

23 With respect to GE, this dispute is about repeated
24 misrepresentations that GE made to Alta outside of contracts.
25 So we will go through those, but I want to reorient the Court

1 to what this case really is about with respect to GE.

2 There's certainly a lot of allegations in the petition
3 concerning Wattstock.

4 But with respect to GE, at its very heart this case
5 is a fraud claim, a negligent misrepresentation claim
6 directly against GE because of the representations that it
7 made directly to Alta.

8 So I'm going to start there with the fraud and
9 negligent misrepresentation claims. This slide shows the
10 issues that we want to cover. The -- first we'll start with
11 fraudulent negligent misrepresentation. We'll talk about one
12 of the remedies for that which is unjust enrichment. Then
13 we'll talk through all of the various theories whereby GE can
14 be held liable for Wattstock's conduct. Again, those are
15 secondary to the direct fraud claim, certainly, and then we
16 can talk about consequential damages.

17 So let's start with fraud. Next slide.

18 So, first, I want to point the Court to this
19 benchmark case. It's a Fifth Circuit case and, you know, it
20 makes clear that what constitutes particularity with respect
21 to Rule 9, you know, differs with the facts of each case.
22 And in that case is a good example of a situation much like
23 ours where, you know, there were pleadings of the who, what,
24 when, where, you know, with respect to names of an entity,
25 general time frames, you know, a month during the year and

1 that kind of thing. And the Court held that those
2 allegations were sufficient.

3 So next slide.

4 The Rule 9 issue, the who, what, when, where,
5 there's -- I think, really, GE is just pretending that
6 certain allegations in the petition don't exist. But they
7 do. So who? Let's talk about who.

8 Mr. Harrington's name does not appear expressly in
9 the petition, but as the Court knows and as GE's counsel has
10 repeatedly represented to the Court, the petition references
11 documents between the parties and those documents are
12 incorporated by reference into the petition. And one of the
13 express representations that's outside those three contracts
14 that GE wants you to focus solely on is a letter from Mr.
15 Harrington that is referenced expressly in Paragraph 78 of
16 the petition. It is a representation by Mr. Harrington. It
17 is plausible to -- it is plausible from the pleadings that
18 the other meetings between Alta and GE would have involved
19 Mr. Harrington since they were looking to Mr. Harrington to
20 set forth representations about GE's involvement in writing.

21 It looks like you have a question.

22 THE COURT: Well, this was a big question I had
23 coming in. You know, we've all heard a million times you
24 have to plead the who, what, when, where and how for fraud.
25 And most of your paragraphs use the phraseology, Alta/GE did

1 this, said this, whatever. And, you know, is that a problem
2 for you?

3 MS. PULLIAM: Yeah. I think that's a great
4 question. And, one, it certainly wasn't a problem in State
5 Court.

6 THE COURT: Uh-huh.

7 MS. PULLIAM: And, two, even under the federal
8 standard, this is why I would urge the Court to look at this
9 *Benchmark* case. I don't think it is. We obviously -- you
10 know, when the petition was written, it was not written for
11 Federal Court. It might have been written slightly
12 differently. But all of the elements are there. So I don't
13 think it is a problem ultimately if the Court looks to what's
14 referenced in the petition which it's actually required to
15 do.

16 So the who even under the *Benchmark* case can be GE.
17 I mean, when you're talking about a website, it's GE's
18 website, right? But with respect to other representations,
19 and a big one is this written representation by Mr.
20 Harrington that supplies directly from the petition a named
21 individual. It is certainly very plausible from the
22 pleadings in the petition to glean that Mr. Harrington was
23 the one involved in the discussions between GE and Alta and
24 GE and Wattstock and involved in those meetings given that he
25 was the one who responded in writing with that letter with

1 respect to questions about the relationships when it was
2 asked of him.

3 THE COURT: Okay. So if I go back and look at the
4 *Benchmark* case, you're telling me it involved facts where the
5 who, the human being was not actually identified in the
6 pleading, and the Fifth Circuit said that was good enough?

7 MS. PULLIAM: So I don't remember every single fact
8 in that case --

9 THE COURT: Uh-huh.

10 MS. PULLIAM: -- and there may, like in our
11 situation, be -- there may have been references to an
12 individual. But there also were allegations like in our case
13 about an entity.

14 THE COURT: Uh-huh.

15 MS. PULLIAM: So, I mean, here I don't think that
16 the individual is missing. The individual person isn't
17 missing. He's there. The fact that his name does not appear
18 per -- you know, in Paragraph 78 I think is no moment because
19 Paragraph 78 references a letter that he sent.

20 THE COURT: Okay. Thank you.

21 MS. PULLIAM: Sure.

22 So that's the who.

23 The what, the petition contains numerous
24 allegations about what the misrepresentations were. It's not
25 just that GE were in and Wattstock were in a partnership.

1 That is a big part of it. But as we will see, Mr. Harrington
2 represented the benefits of that partnership, the
3 relationship of that partnership, what that partnership meant
4 and what Alta could rely on if Wattstock, because there were
5 concerns at the time about Wattstock being this fledgling
6 entity, if something were to happen to Wattstock. Mr.
7 Harrington addressed those issues and the benefits of the
8 partnership.

9 With respect to the price of the turbines, there
10 were -- there's also multiple allegations about that. It
11 doesn't -- let me clarify something, too. This LNTP contract
12 is just related to one piece of this overall relationship.
13 But -- and so there were representations in that contract
14 that we can talk about with respect to pricing. But there
15 are also representations outside of that contract with
16 respect to pricing that are alleged in the petition.

17 And the key thing that I think was lost earlier,
18 and this was something that the State Court certainly focused
19 on and denied all of these same arguments. And, by the way,
20 what's interesting -- I forgot to mention this -- GE had
21 prior counsel and prior counsel in the State Court actually
22 did argue that Rule 9(b) applied in Texas State Court. He
23 wasn't from Texas. He sort of made a mistake. So, actually,
24 they already did make all of these same arguments before the
25 State Court and they were soundly rejected.

1 But one of the things that the State Court focused
2 on was what -- explain this issue to me with respect to the
3 pricing. And here's the issue. So there was discussions,
4 there were discussions about the pricing and how important it
5 was to Alta. And that's all set forth in the petition.

6 And the reason that those were misrepresentations
7 was because what was missing from the pricing were fees, sort
8 of like if you think of like breakup fees that these turbine
9 owners were required to pay to GE. So what was missing from
10 the pricing representations was peculiar with -- peculiarly
11 in the knowledge of GE. It knew that it had these
12 requirements to be paid these fees. That was in GE's
13 knowledge. It wasn't in Alta's knowledge. So that's the
14 issue with the pricing misrepresentation, if that makes
15 sense. That's something that the State Court rightfully
16 wanted to understand.

17 So, okay. Then the when, we've got allegations in
18 the petition. The petition sort of goes, if you look at it,
19 it starts talking in 2018, describes meetings that occur in
20 2018 and then talks about how this master agreement is formed
21 in February of 2019. So, you know, does the law require in
22 these kinds of allegations for there to be a particular date,
23 you know, a single date or a point in time when these
24 meetings took place. No. It just doesn't. They can't point
25 to a case that says that. The petition has certainly

1 sufficient particularity to say there were meetings that took
2 place over the course of 2018 that led up to this master
3 agreement being signed.

4 The website, that was available and something
5 that's alleged in the petition and, you know, that's -- it
6 was available over, you know, a lengthy time period. So
7 that's also the when.

8 The Harrington letter that we've been talking
9 about, that is referred to specifically in the petition.
10 There is a date associated with it in July of 2019.

11 The LNTP agreement itself with those written
12 pricing representations that we can talk about. There's
13 obviously a specific date associated with that.

14 Where, you mentioned the Jacintoport facility.
15 There are specific representations about where those
16 representations were made, GE's own website and in these
17 written representations that we've talked about.

18 So the who, what, when and where are satisfied.

19 Now let's talk about -- and this is the GE website,
20 and I would just focus the Court on certain representations
21 in it, talking about how GE and Wattstock were going to
22 collaborate, how GE was the one to select the best -- the gas
23 turbine to best meet the operating profile; that Wattstock
24 was going to refurbish the package in accordance with GE
25 standards, and that GE, importantly, was going to warranty

1 all of this.

2 Next slide.

3 Now this is the letter that Mr. Harrington sent.

4 It's a blow up of it, obviously. This is what is referred to
5 in Paragraph 78 of the petition and it -- they want to run
6 from everything in this letter except for the fact that it
7 references the MOU, which GE did not send to our parties and
8 instead sent this letter.

9 So what does this letter say? Well, it says that
10 there are a whole lot of reasons that GE is willing to
11 warranty Wattstock's work on this project. That warranty
12 language is the exact same language that you just saw on the
13 website.

14 First, Wattstock's operation is collocated next to
15 our engine overhaul facility. So we're co-located.

16 GE will be tracking project progress daily and
17 could quickly assume work scope without transportation. We
18 already conduct oversight of all aspects of Wattstock's work
19 and we will be intimately acquainted with each unit and its
20 refurbishment program.

21 As a leader in this area, we have broad network
22 suppliers that we expect to be able to call on. And most
23 importantly, GE has a strong incentive for this project to
24 succeed.

25 Those are pretty strong representations, Your

1 Honor. What we heard earlier was that, well, Alta was just,
2 you know, crazy to rely on these issues because GE might have
3 said partner, but they didn't mean it in a legal sense. GE,
4 and I wrote this down because it surprised me. GE never said
5 "we're going to be right there." I don't know how else you
6 interpret this letter. It literally says, we're going to be
7 right there.

8 So that letter provides one of the cores of the
9 fraud claim, Your Honor, one of the core representations that
10 is alleged in the petition.

11 All right. We're getting to a topic that is near
12 and dear to my heart, Your Honor. I love justifiable
13 reliance. I confess I'm usually on the defense side of that
14 issue. The *Orca* case that Mr. LeGrand spoke about was a case
15 that I had in Texas State Court and won the motion for
16 summary judgment. I lost in the Court of Appeals and my
17 partner, Evan Young, had to go bail me out before the Texas
18 Supreme Court. So I know that case pretty well.

19 And one of the reasons, I'll tell you, that we took
20 this case is because we believed that there were no direct
21 contradiction issues. And we believed that there were not
22 the kind of red flags that presented themselves in the *Orca*
23 and other cases.

24 So, first of all, all of the cases on these issues
25 talk about how justifiable reliance is always fact bound.

1 And there are some circumstances in which it can be decided
2 as a matter of law. Rarely, certainly not in the *Orca* case,
3 can it be decided at a motion to dismiss stage without the
4 benefit of discovery.

5 One -- so let's talk about the *Orca* case for just a
6 minute. And, actually, let me take a step back.

7 This, I don't know how to say this *Arlington*, the
8 name of this *Arlington* case, but that's a good case we cite.
9 I think there's a footnote about it in our response brief,
10 just talking about how this typically should not be an issue
11 that's decided on pleadings, certainly.

12 *Orca*, there was tons of discovery in that case
13 before the issue was decided. We were headed to trial and
14 the Court granted a judgment as a matter of law really on the
15 eve of trial, so tons of discovery had taken place.

16 But what was the key issue in that case was that,
17 first of all, the parties, there were two parties. There was
18 *Orca* on the one hand, *JPMorgan* on the other, and they signed
19 a letter of intent between the two of them and ultimately a
20 lease for oil and gas assets in Texas.

21 And the letter of intent and the lease contained a
22 specific contractual provision that basically said, hey,
23 *Orca*, you are responsible for, it is your job to figure out
24 title of these oil and gas assets. That's on you. It's not
25 on us, *JPMorgan*. That's on you.

1 And that was the big red flag. Okay. So there
2 were lots of other red flags. *JPMorgan* was a sophisticated
3 party. The guy who on *Orca* was a very sophisticated party,
4 and he -- what *Orca* was alleging was that *JPMorgan* made
5 representations that were directly to the contrary of what
6 their job was. Their job was to go figure out title and the
7 bank made no representations about title.

8 And so when they came to the courthouse and said,
9 well, they -- *JPMorgan* misrepresented title to us, you know,
10 the Court was understandably skeptical about how it could be
11 that you could justifiably rely on the bank's representation
12 about title when the contractual agreement that you signed,
13 both of them, said, hey, *Orca*, you're the one who was
14 supposed to investigate and you're the one who was totally
15 responsible for issues of title. That's *Orca*. That is not
16 our case.

17 What happened in our case is that there was a
18 memorandum of understanding back in 2018 between GE and
19 Wattstock. There is no allegation that that memorandum of
20 understanding is ever given to Alta. Instead, the petition
21 alleges that when Alta reaches out with its banker -- I keep
22 doing that.

23 THE COURT: Everyone does.

24 (Laughter)

25 MS. PULLIAM: I talk with my hands. I learned it

1 from my daddy and I just can't, I can't break the habit.

2 So when Alta reaches out through its banker,
3 Deutsche Bank, and says, hey, we need some assurances because
4 you've been saying things to us like you're, you know, you're
5 GE. You're Wattstock's partner. We need some assurances
6 here. We -- our banker wants to know, you know, what do you
7 really have to say about this, GE. Right it down for us.

8 Does the petition say at that point that GE hands
9 over the MOU? No, it does not. It says that Mr. Harrington
10 writes a letter and the letter references the MOU and,
11 therefore, suggest that the MOU is consistent with the very
12 representations that Mr. Harrington writes in his letter.

13 And let's look back at it.

14 So Alta reaches out with is banker and says, hey,
15 we need these assurances, what's your relationship. Yes,
16 this letter that Mr. Harrington writes refers to the MOU,
17 doesn't give it, doesn't attach it, nothing in the petition
18 says that. Instead, it says all of these things that
19 reassure Alta about GE's relationship. It literally says
20 that we will warranty Wattstock's work on this project and we
21 will conduct oversights of all aspects of Wattstock's work.

22 So let's go to the next page.

23 This memorandum of understanding cannot be a red
24 flag. This red flag was concealed. Instead, GE gave Alta a
25 green light.

1 And go back one more time. Sorry. I'm bouncing
2 around, Krissy (sic).

3 This Stabilis Fund case is another one that I think
4 is helpful for the Court to look at, too, because it's one
5 that GE actually cites in its reply brief and relies upon.
6 And it again addresses the motion to dismiss standard. They
7 cite it for the purpose of saying that a party has to follow
8 up if there are these red flags. What they're ignoring is
9 that's exactly what Wattstock -- I mean, what Alta Power did.
10 It followed up. It said, hey, give us something in writing.
11 That's what happened.

12 Alta did get something in writing. The supposed
13 true nature of the relationship between GE and Wattstock was
14 not given, and instead GE suggests in this letter that the
15 MOU is consistent with what this says.

16 All right. So I want to address next the direct
17 contradiction issue. The direct contradiction issue is
18 narrow. Again, the direct contradiction in the *Orca* case was
19 on the one hand a representation, yeah, there's maybe title,
20 and on the other hand, a contractual provision that said,
21 hey, *Orca*, you're totally responsible for investigating title
22 and figuring out title and you bear all the economic risk of
23 title. That's a direct contradiction. Those two can't
24 simultaneously exist.

25 There's no direct contradiction in our case. The

1 best that they muster is, well, you -- Alta, you signed a
2 contract with Wattstock. Well, okay. Sure. We admit that.
3 We -- you suggested that that's how the relationship should
4 take place. Does the fact that we signed a contract with
5 Alta preclude the existence of a partnership between GE and
6 Wattstock? No. Those two things can simultaneously exist.
7 It can be true that Alta Power signs a contract with
8 Wattstock and Wattstock and GE can still be in a partnership.
9 Those two things do not -- are not mutually exclusive.

10 The other thing that's not mutually exclusive is it
11 can be true that Alta signs a master services agreement with
12 Wattstock and yet GE still makes representations about how it
13 is going to stand by Wattstock in the carrying out of that
14 relationship.

15 In fact, that's exactly what happened here. As we
16 just discussed, there was a master services agreement signed
17 in February of 2019. And then what happened after the
18 February 19 master services agreement? Well, Alta was out
19 trying to get financing, working with Deutsche Bank.
20 Deutsche Bank says, hey, we would like to get some assurances
21 about GE's involvement here.

22 What happens next? July of 2019, Mr. Harrington
23 sends that letter that we've been looking at. Did in that
24 letter Mr. Harrington say, well, I can't say anything. There
25 is nothing. There is nothing to see here. I can make no

1 assurances because Alta signed the contract with Wattstock,
2 not GE, so I can't make you any assurances. Is that what Mr.
3 Harrington said? No. Mr. Harrington instead made all kinds
4 of representation about how GE was going to be standing right
5 there with Wattstock.

6 Finally, the other really interesting thing to me
7 is that there continue to be these references about merger
8 clauses and contracts and how they preclude reliance. We
9 cited the Court to *Italian Cowboy* in our response. It's a
10 crazy case name. You can't forget it. It was a restaurant
11 name. But it's in this line of cases along with *Orca* and
12 several others related to justifiable reliance.

13 And in that case, I believe it was a lease
14 situation between this restaurant called *Italian Cowboy* --
15 I've always wondered what they served for food.

16 (Laughter)

17 MS. PULLIAM: So in that case there was a standard
18 merger clause in the contract and in one of those --- this --
19 these representations are -- these -- the contract contains
20 all the provisions. Right. There aren't extra contractual
21 provisions to the contract.

22 And the Texas Supreme Court said, and I quote,
23 "Pure merger clauses without an express, clear and
24 unequivocal intent to disclaim reliance or waive claims for
25 fraudulent inducement have never had the effect of precluding

1 claims for fraudulent inducement."

2 So there's a whole body of Texas case law about how
3 merger clauses don't preclude claims for fraud. It would
4 probably take another hour of my time to go into all of that.
5 *Italian Cowboy* is the place to look. Somehow GE just ignored
6 that in their briefing. It continues to surprise me.

7 So the other piece is this LNTP contract, again,
8 that just related to one of these units, not the overall
9 relationship. You know, the -- if you look at Page 43 of
10 GE's presentation to you, it's got -- it looks like this.
11 And it's got these pricing representations in it.

12 If -- here's the problem with that, right, is that
13 there's no direct contradiction here either because it talks
14 about the pricing. Right. And it says, you know, based on
15 the below listed assumptions here's the purchase price. The
16 problem here is that there's no disclosure of this known fee
17 that I mentioned earlier. That's not a direct contradiction.
18 That's just like you failed to mention something that's
19 material that you know about. So that's just a
20 representation in the contract itself that certainly can't go
21 away because of the merger clause and can't even go away
22 because of a non-reliance clause in the LNTP. It's a
23 representation right there in the agreement itself.

24 All right. That -- that's -- those are the basic
25 issues on fraud, one of my favorite issues in the law, so

1 happy to discuss it. I could talk about it forever.

2 Economic loss rule.

3 Let's go to the next slide.

4 You didn't even really hear today any argument that
5 the economic loss rule applies to fraud. It doesn't.

6 Next slide.

7 And this is a case that I confess we did not cite
8 in our response brief, probably should have, but it talks
9 about the application of the economic loss rule to negligent
10 misrepresentation. And here concludes that it does not bar a
11 claim for out of pocket or reliance damages caused by
12 negligent misrepresentation. So while the negligent
13 misrepresentation claim may be somewhat limited in the remedy
14 that can be sought, it -- the economic loss rule does not
15 preclude the claim entirely.

16 Okay. That's it on the fraud, the substance of the
17 fraud and negligent misrepresentation.

18 With respect to unjust enrichment, again, very
19 little time spent on that earlier. I'll go through it
20 quickly.

21 So this is a remedy for fraud. This case out of
22 the Fifth Circuit can -- talks about how unjust enrichment is
23 a remedy for fraud when one person has obtained a benefit
24 from another by fraud and it -- unjust enrichment categorizes
25 the result of failure to make restitution of the benefits

1 either wrongfully or passively received under the
2 circumstances.

3 So that's what happened here.

4 Next slide. Oops.

5 (Pause)

6 MS. PULLIAM: So with respect to unjust enrichment,
7 here are the allegations in the petition. GE and Wattstock
8 represented to Alta Power that GE needed to be paid \$1.5
9 million to secure the purchase of these products. Alta paid
10 over two payments and then all of a sudden Alta learns that
11 the pricing was misrepresented.

12 So what do you -- what is fair to glean from these
13 allegations; that GE needed to be paid that amount and that
14 Alta paid them once GE got the money. You know, that can
15 certainly come out in discovery which has since occurred
16 since the filing of the petition. But the allegations are
17 right there that support the unjust enrichment claim.

18 All right. Partnership by -- so, okay. So we've
19 now talked through fraud, negligent misrepresent -- I mean,
20 fraud, negligent misrepresentation, unjust enrichment, both
21 the direct claims against GE, again, the real focus of the
22 suit against GE.

23 So now we'll start talking about these theories
24 whereby it's also true because of GE's conduct that GE can be
25 held liable for Wattstock's conduct. So secondary issue, but

1 certainly sufficiently pleaded in the petition. And, again,
2 all of these issues were raised to the State Court who denied
3 the motion to dismiss. All of these issues are covered by
4 the general pleading standard, are not required to be pled
5 with particularity and, again, that standard that just
6 requires us to raise a right to relief above a speculative
7 level applies to all of these allegations.

8 So, first, partnership by estoppel, the thing that
9 is odd to me is that it seems that GE keeps saying that this
10 only applies in situations where credit is being extended.
11 Certainly, there are cases talking about how partnership by
12 estoppel, you know, may apply in those situations and that
13 there may be particular sensitivities about whether
14 partnership by estoppel can apply in a credit situation.

15 The cases don't say that partnership by estoppel
16 does not exist outside of that context. There's nothing that
17 GE has cited that says that. And, in fact, this *Rainier* (ph)
18 case is not about an extension of credit. And there I'll
19 tell the Court that the plaintiff didn't win on the theory at
20 the end of the day. But that was because the courts held,
21 not in the extension of credit context, to two elements, a
22 representation that one sought to be bound as a partner and
23 the other party to whom here would be Alta, the
24 representation is made, relies on the representation. Those
25 are the only elements.

1 In the Rainier case, the problem was with the
2 second element, that the defendants didn't actually know
3 about the representations, so it didn't apply there. Well,
4 here, you know, we've got meetings. We've got the Harrington
5 letter. We've got the website. Certainly, Alta knew and
6 relied on the representations.

7 You know, the other cases that I think were cited,
8 this Naples case that was cited. I mean, the big difference
9 here -- and what, from what they're saying is that MOU was
10 concealed and misrepresented. In that Harrington letter,
11 it's referred to and then Harrington goes on to say about all
12 these great things that GE was going to do. Did he say one
13 time, by the way, we're not partners. There's no agency
14 here. No. He didn't say that.

15 So do we -- do the pleadings satisfy these two
16 fairly simple elements under the general pleadings standard?
17 The answer to that is yes. Representation that one sought to
18 be bound as a partner, that's littered throughout the
19 petition. We've talked about, you know, this doesn't have to
20 be in this context, a particularized pleading, but actually
21 it is in the petition, and reliance on that representation.
22 There are gads of allegations that Alta relied on those
23 representations.

24 So that's partnership by estoppel.

25 Let's next talk about joint enterprise. So here

1 are the elements of joint enterprise. There are four of
2 them. An agreement expressed or implied amongst the members
3 of a group; a common purpose to be carried out by the group;
4 a community of pecuniary interest in that purpose among the
5 members; an equal right to voice in the direction of
6 enterprise which gives an equal right of control.

7 Let me just pause on this last one for a second.
8 It seems like GE's big argument here is like, oh, I think
9 it's Paragraph 27 of the petition. I could have that wrong.
10 Oh, you know, Alta pleads themselves out of court -- I love
11 that -- because they say that GE was actually the one in
12 control. Well, you know, again, we're at the pleading stage
13 and there's no requirement at the pleading stage that you
14 pick one cause of action.

15 So there are also allegations in the petition that
16 these parties were -- both had a voice in this joint
17 enterprise.

18 So let's walk through each of these elements.

19 The first two, an agreement expressed or implied
20 amongst the members of the group a common purpose to be
21 carried out by the group. Again, I'm going to go back to
22 this letter from Mr. Harrington. This is just one of the
23 allegations in the petition that supports this, also the
24 meetings, et cetera, but this letter is just a great summary
25 of it all.

1 I mean, this is literally Mr. Harrington
2 representing to Alta that there is an express or implied
3 agreements amongst the members of the group for a common
4 purpose. You see the words, jointly determined. We will
5 work together. We have agreed. Those elements are met, Your
6 Honor.

7 A community of pecuniary interest in that purpose
8 amongst the members. You know, GE seems to suggest that
9 there's got to be like an ownership interest or a control
10 over a bank account. And that's just not the case. It's
11 certainly not the case that those kinds of allegations must
12 be made at the pleadings stage. Again, certainly, GE would
13 be welcome to revisit this issue at the summary judgment
14 stage if for some reason the actual evidence demonstrates
15 that this is false. But it does not appear that it will
16 because, first of all, GE and Wattstock represented that Alta
17 Power need -- represented to Alta Power that GE needed to be
18 paid this \$1.5 million. We believe that that allegation is
19 true.

20 And GE also represented to Alta directly that there
21 were all these reasons why GE was willing to warranty -- a
22 warranty certainly involves some pecuniary interest --
23 Wattstock's work on this project. GE expressly represented
24 to Alta that it has a strong incentive for this project to
25 succeed. Again, if those allegations aren't -- don't raise a

1 right to relief about a speculative level, I don't know what
2 does.

3 I will suggest the Court turn to --

4 Let's go to the next slide.

5 This *Abel* (ph) case that we cite in our briefing
6 and is at the bottom of this slide here. That case -- in
7 that case the Court found a joint enterprise between two
8 entities with respect to an accident that occurred. The
9 Court found that a joint enterprise existed even though one
10 entity exercised -- was exercising the day-to-day control.
11 This was a joint enterprise between the Houston Metro and Tex
12 DOT, I believe. So there's a joint enterprise even though
13 one entity was exercising the day-to-day control to maintain
14 the road. But the Court noted the evidence that both parties
15 invested significant resources funds and contemplated pooling
16 efforts to best utilize those funds. There was nothing in
17 this case about shared bank accounts or an ownership
18 interest.

19 So, again, there are sufficient pleadings of facts
20 to get past the plausibility standard here. GE and Wattstock
21 jointly determined how to carry out the project, and they
22 jointly negotiated and there's plenty of allegations.

23 The fact that there is a stray reference to
24 complete control in one part, one paragraph in the petition
25 really does not matter because at this stage we are allowed

1 to allege alternative and mutually exclusive theories.

2 That's not something that should be decided at the motion to
3 dismiss stage.

4 All right. Next topic. Apparent authority.

5 Just real quickly, back to joint enterprise, I just
6 want to make the pleading point one more time. I believe
7 it's *St. Joseph's*. It's also a joint enterprise case. You
8 heard a lot about it before. I'm told again by Ms. Wallace
9 that that case was following a jury trial. The opinion in
10 that case followed a jury trial. So, again, we're just in a
11 very different procedural stage of the case here.

12 All right. Apparent authority, apparent authority
13 to do an act is created as to a third person by written or
14 spoken words or any other conduct of the principal which
15 reasonably interpreted causes a third person -- here, Alta --
16 to believe that the principal consents to have the act done
17 on his behalf by the person purporting to act for him.

18 That's kind of a mouthful. But, basically,
19 apparent authority means what it sounds like it should mean.
20 It means that Alta, it was apparent to Alta, that there was
21 authority given in the GE Wattstock relationship. Again,
22 gads of pleadings about this that aren't required to be
23 specific under the pleading standards, but nevertheless are.

24 GE intended for and held out Wattstock to be the de
25 facto sales force and they used error derivative gas turbine

1 market for GE. GE penned a letter confirming that if
2 Wattstock failed to meet its contractual obligations, GE
3 would step in. They had meetings in which both personnel
4 joined at the Jacintoport facility. During these meetings,
5 GE and Wattstock described themselves as partners and made it
6 clear that the only way Alta Power can obtain this true
7 package certification and warranty was by working with their
8 partnership. You know, GE directed the contracting between
9 Alta and Wattstock, and GE and Wattstock caused Alta Power to
10 believe that GE's involvement would insulate Alta Power from
11 concerns related to Wattstock's financial viability.

12 All of that is in the petition. All of that is --
13 goes directly to these apparent authority standards.

14 Actual agency, it's interesting. That's where my
15 colleague started. So, here, let's advance.

16 So this is an alternative theory that's pled in the
17 petition. And, again, we are at the pleading stage and we
18 can plead multiple theories and they can be tested through
19 evidence. But the pleading to support this is here. Agency
20 is a consensual relationship whereby one is subject to --
21 where the agent is subject to the principal's control. And
22 agency relationships do not require the principal to
23 expressly appoint the agent, and the parties' conduct can
24 imply an agency relationship.

25 The *Intel* case that was cited on previously is

1 about doctors. It is -- it's a very industry specific case,
2 and I think the facts and circumstances of it were ignored.
3 And it certainly doesn't apply here where, you know, you've
4 got one party basically saying that it will take
5 responsibility for and warranty the work of another party.
6 That just wasn't present in the *Intel*, the case that you
7 heard about earlier.

8 Next slide.

9 Agency is typically a factual issue with the
10 plaintiff at the pleading stage only required to allege fact
11 -- a factual basis that gives rise to an inference of an
12 agency relationship through the use of generalized as opposed
13 to evidentiary facts.

14 So let's talk about what those are.

15 The agent agrees to act on the principal's behalf.
16 Here's the allegation. GE engaged former GE employees who
17 started at Wattstock to act as its sales force. The petition
18 alleges in reality GE intended for and held out Wattstock to
19 be the de facto sales force in the used error derivative gas
20 turbine market for GE.

21 We also know that the pleadings allege that GE
22 required money to be paid to it as part of this relationship.

23 Agent acts subject to the principal's control.
24 Allegation, GE's willing to warranty Wattstock's work on this
25 project. GE will be tracking progress daily and already

1 conducts oversight of all aspects of Wattstock's work.

2 Again, that's out of GE's own mouth in writing signed by Mr.
3 Harrington.

4 Another allegation, for any package purchased by
5 Wattstock from a third-party owner, GE at its sole option may
6 purchase the associated gas turbines from Wattstock.

7 So, again, we're at the pleading stage. These
8 allegations are certainly sufficient to satisfy the
9 evidentiary standard.

10 Now I'm going to go into consequential damages
11 unless the Court has a question.

12 THE COURT: No questions.

13 MS. PULLIAM: Okay.

14 So let's look at this consequential damages'
15 provision, and so a couple of things to know. It's sort of
16 funny to me. So we're talking about consequential damages
17 provision in the master services agreement that was signed in
18 February of 2019. One of the things that's important to
19 note, right, is where we started. This case primarily
20 against GE relates to fraudulent statements that it made
21 directly to Alta. Those fraudulent statements are outside of
22 the master services agreement that GE -- that -- I'm sorry --
23 outside of the master services agreement that Alta signed
24 with Wattstock.

25 So, again, what we're looking at is language from a

1 February 2019 master services agreement. After this
2 agreement is signed, we've got Mr. Harrington in July of 2019
3 making direct representations to Alta that are outside of
4 this agreement.

5 So all this issue about -- is about is whether Alta
6 has pleaded any basis, that's all we need to get past the
7 dismissal stage for consequential damages. Well,
8 consequential damages is one of the measures of damages for a
9 fraud claim. We've alleged multiple bases for a fraud claim
10 against GE. I'm just going to give one example that is
11 clearly outside of the master services agreement, comes after
12 based on Mr. Harrington's letter in July of 2019.

13 So just looking at the very top of this, this
14 provision, it just doesn't apply to certainly one of the
15 bases for consequential damages. So, you know, that --
16 that's game over for consequential damages. All we need is
17 one theory to get past this at the dismissal stage.

18 There's a whole lot more, though. Even under this
19 language, this language does not preclude fraud --
20 consequential damages for fraud and the inducement of this
21 master services agreement. And that issue involves a lot of
22 contractual interpretations that have all those Latin words
23 that I never can remember, but I'm going to do my best to get
24 through it.

25 So, first of all, if you look at the first

1 provision, right, it's clear there's a limitation of
2 liability. Right. What does it apply to? Any and all
3 liability or cause of action arising under this agreement.

4 Well, the law says that fraud does not arise under
5 a contract. Fraud is independent and there are independent
6 duties to not defraud another. So fraud does not arise under
7 a contract, so that doesn't apply.

8 Then go to the next provision and there's a couple
9 of issues here. There's a provision in this 9.1(b) and then
10 there's sort of two pieces of it is what I'm trying to get
11 across. And the first piece relates to the type of damages
12 that are limited. So it says, this mutual waiver of
13 consequential damages shall include, but is not limited to,
14 the loss of use, loss of profit, yada, yada, yada, yada.

15 And you notice that language, shall include, but is
16 not limited to. So that's in the agreement. Clearly, the
17 parties know how to use that phrase that lawyers like to use,
18 shall include, but not limited to, which indicates these are
19 examples but they are not intended to be limiting.

20 Then you go to the next phrase and this next phrase
21 relates to the causes of action to which that consequential
22 damages' waiver applies. Now there do you see the shall
23 include, but is not limited to language? No, you don't.
24 Instead it says, any cause of action including negligence,
25 strict liability, breach of contract, breach of strict or

1 implied warranty.

2 So what do all those causes of action have in
3 common? They're not causes of action like fraud that have a
4 scienter intent component. So if you look at Texas case law
5 and all of those Latin concepts that relate to how you
6 interpret contracts, and you fit the contractual languages
7 together, what you see is that even this contract, setting
8 aside the independent representations that GE made directly
9 to Alta that provide their own avenue for a consequential
10 damages' claim, even if you're just talking about fraudulent
11 inducement of this contract, the very language of the
12 contract doesn't prohibit that.

13 So let's talk through some of these concepts.

14 THE COURT: And I'm going to let you know you've
15 gone just over an hour.

16 MS. PULLIAM: I'm sorry.

17 THE COURT: No. So if you could --

18 MS. PULLIAM: I'm going to wrap it up.

19 THE COURT: -- speed it along.

20 MS. PULLIAM: So --

21 THE COURT: Five minutes.

22 MS. PULLIAM: -- I'm going to -- thank you.

23 THE COURT: Uh-huh.

24 MS. PULLIAM: I told you I might need that
25 reminder.

1 So these language -- these cases just talk about
2 these contractual concepts that I'm not going to bore you
3 with and help you understand how that contractual language
4 works together.

5 And if -- let's keep advancing. Something's funny
6 with our slide there. Can you refresh that? I don't --
7 maybe it's just me. There we go.

8 So this is just a little way to help you organize,
9 you know, just what we're talking about with respect to
10 fraudulent -- consequential damages that would flow from
11 fraudulent inducement of that master services agreement. It
12 does not apply to intentional torts and, therefore,
13 consequential damages for an intentional tort, a fraudulent
14 inducement are not waived.

15 And then the only piece that I will go back to is
16 that you heard again in a consequential damages' argument
17 this notion that somehow merger clauses in a contract defeat
18 fraudulent inducement. And, again, that is just not Texas
19 law. That is just flat out wrong and *Italian Cowboy* is
20 really all the cite you need for that.

21 And with that, Your Honor, I will stop boring you.

22 THE COURT: Okay. Thank you.

23 All right. Mr. LeGrand, did you care for a
24 rebuttal? You had just a few minute --

25 Bob, how much time did he have left? He had --

1 UNIDENTIFIED SPEAKER: Just a couple -- an hour
2 exactly.

3 THE COURT: Oh, he went an hour exactly?

4 UNIDENTIFIED SPEAKER: Including the time you --

5 THE COURT: Including my questions.

6 I'll give you a couple of minutes rebuttal if
7 you --

8 MR. LEGRAND: Thank you, Your Honor.

9 THE COURT: -- if you want to make that --

10 MR. LEGRAND: I'll be brief.

11 Your Honor, Alta's argument seems to be that these
12 types of claims can never be dismissed at the pleadings
13 stage. I would just point the Court to *Mayer* and the *DT*
14 *Apartment* case, both Northern District of Texas cases, which
15 dismiss these exact types of claims on the pleading.

16 I just want to take through a couple of the cases
17 that came up in Alta's presentation.

18 First, the *Benchmark* case, I think there was a
19 representation about that being a group pleading case.
20 Actually, the parties stipulated to the individual who made
21 the representations.

22 The THEAG North Arlington case actually involved an
23 allegation of due diligence and, in fact, it came up in the
24 context of a purchase of a company. And so there was actual
25 due diligence being done and questions being asked about the

1 finances of the company.

2 Interestingly, the plaintiff in that case actually
3 pleaded the why or the how of the fraud, too, why the
4 statements about the company's financial affairs were
5 fraudulent or misleading.

6 The *Italian Cowboy* case, that case was actually --
7 actually pre-dated the *Orca* case which my friend said she was
8 personally involved in. And I would again point the Court
9 back to *DT Apartment* where Judge Fitzwater actually deals
10 with this and explains how you reconcile all these cases. If
11 you have a pure merger clause that doesn't expressly disclaim
12 reliance, yeah, you don't negate, conclusively negative
13 reliance as a matter of law. If you have a merger clause
14 like we have here that does expressly disclaim reliance, you
15 have no fraud.

16 My friend cited the *Rainier* case from the Fifth
17 Circuit and said that wasn't a credit card. It actually was
18 an investment case, so there was an expectation of repayment.
19 But in any event, the Fifth Circuit said in that case it
20 expressed it was highly doubtful that the representations
21 about being partners could be sufficient. The Fifth Circuit
22 said that in the *Rainier* case, and then it went on to, as my
23 friend said, throw out the claim because there was no proof
24 or allegation that the plaintiff had relied on the statements
25 that were allegedly made because they hadn't seen them.

1 And then finally the *Abel* case, which was cited,
2 and I think the -- you know, the *Abel* case is, if I remember
3 correctly, it was about joint enterprise liability. That
4 case again if you compare it to *Triplex*, and the other case
5 is escaping me right now, *Triplex* and *St. Joseph Hospital*, I
6 think the *St. Joseph Hospital* and *Triplex* line of authority
7 actually applies.

8 Oh, I'm sorry. And the one thing that applies
9 there, I meant to flag in the *Abel* case, I think my friend
10 said that there was no allegation about the two government
11 agencies sharing resources or pooling your property. That's
12 actually not true. The case actually expressly refers to the
13 fact that these -- that Tex DOT and Metro had shared money
14 and had shared responsibility for the operation and
15 maintenance of the toll roads.

16 Quickly, Your Honor, on the termination fee issue,
17 this is why I think, you know, Rule 9(b) is so important
18 because they don't allege who from GE specifically said that
19 there was a not to exceed price of \$6.5 million. Instead, at
20 Paragraph 145 of their third-party petition they allege that
21 GE/Wattstock or GE and Wattstock represented that these
22 turbines could be procured at competitive prices.

23 Now what does that mean? If you look at the actual
24 contract that's incorporated by reference into the complaint,
25 the contract says \$8.125 million. So, I mean, was there any

1 discussion or representation about termination fees, who made
2 -- or not, who made those representations, who made the
3 representation about specific prices. That's not actually
4 included in their complaint.

5 They refer to this letter from July 19 that they
6 say that we ignore certain parts of it, but it's actually not
7 true. That letter just simply says exactly what the MOU
8 says. Of course GE is -- if it says we're going to warranty
9 certain work, we're going to try to make sure that work is
10 being done according to standards. That's just like the case
11 we cited where the physicians were subject to, you know,
12 certain medical professional standards.

13 I also heard arguments about alternative theories.
14 You know, we can allege complete control, but then, you know,
15 also allege equal control. You might be entitled to allege
16 alternative theories of pleadings, but you can't actually
17 allege alternative facts. You have to have facts to support
18 your claims. I mean, that's what the pleading standard is.

19 You know, my friend said that the pleading standard
20 is a low bar. Twombly Iqbal is a low bar. I frankly have
21 not heard that before. I think as I understand the standard
22 it requires a plaintiff or a party to plead facts sufficient
23 to support a reasonable inference that the other party or the
24 defendant is liable for the claims being made.

25 Lastly, on the consequential damages, Alta's

1 counsel just simply ignored 9.1(b) language that says neither
2 party shall be liable or make any claim for consequential
3 damages, that's any claim, arising out of or connected in any
4 way to this agreement as my colleague, Ms. Patel pointed out.

5 And finally, Your Honor, we heard a lot, especially
6 in connection with the references to the July 2019 letter.

7 We heard a lot about GE saying it would warranty the work.

8 But last time I checked, they're not arguing that GE breached
9 a warranty. This is not a breach of warranty case. Right.
10 This is a fraud cause and a vicarious liability case
11 allegedly based on GE's failure to step in and take over the
12 contract, the LNTP and, you know, take on Wattstock's
13 obligations under those contracts.

14 So if GE -- if Alta wants to plead some breach of
15 warranty claim, we haven't seen it. They certainly may try
16 by relying on the letter, but the letter doesn't support
17 fraud because it expressly references the MOU. And it
18 certainly doesn't support their claim that GE somehow said
19 that they would step in and take over for Alta, especially in
20 light of the fact that Alta and Wattstock had separate
21 contracts that GE was not a party to.

22 With that, Your Honor, again, I would just point
23 the Court back to *Mayer* and *DT Apartment*. We think those two
24 cases from the Northern District of Texas should control
25 here. They are directly analogous to the allegations in this

1 case, separate and apart from the pleading deficiencies, as
2 well as the *Orca* case as we mentioned that negates Alta's
3 fraud-based claims.

4 Unless the Court has any questions, we would
5 request that our motion be granted.

6 THE COURT: I do not have questions.

7 All right.

8 MR. LEGRAND: Thank you, Your Honor.

9 MS. PULLIAM: Could I literally have one sentence
10 with respect to a factual issue that I think is --

11 THE COURT: One sentence.

12 MS. PULLIAM: Yeah. The only non-reliance clause
13 in any contract you heard about today is the -- is contained
14 only in the LNTP. So it's only in the LNTP. There is not a
15 no reliance clause in the master services agreement. The no
16 reliance clause in the LNTP says the parties will not rely on
17 out -- extracontractual relationships, extracontractual
18 representations by the parties to the LNTP, which does not
19 include GE.

20 So --

21 THE COURT: Okay.

22 MS. PULLIAM: -- that's it. Sorry.

23 THE COURT: That was a run on sentence, but --

24 (Laughter)

25 MS. PULLIAM: I'm sorry. You're right. It had --

1 THE COURT: Okay.

2 MS. PULLIAM: -- had multiple semicolons.

3 THE COURT: I'm going to take a few minutes to look
4 at a few of these cases. I'm also going to let my conference
5 call people know that I'm going to be a few minutes late for
6 my 12:00 conference call.

7 We'll come back at 10 after 12. All right.

8 MR. LEGRAND: Thank you, Your Honor.

9 MS. PULLIAM: Thank you.

10 COURT OFFICER: All rise.

11 (Recess taken at 11:45 a.m.; reconvened at 12:11 p.m.)

12 THE COURT OFFICER: All rise.

13 THE COURT: All right. Please be seated.

14 We're back on the record in Adversary 21-3083,
15 Wattstock versus Alta Power et al.

16 All right. First, I want to compliment all of the
17 lawyers. We had excellent briefing, wonderful PowerPoint
18 demonstratives. I'm a very visual thinker. I really -- I
19 appreciated those PowerPoints, and just excellent oral
20 argument. I wish I had some summer interns here to have
21 heard this. You all could not have been any better, I think.
22 So I don't throw out compliments lightly. I really enjoy
23 good lawyering and feel like it needs to be recognized.

24 As far as my ruling, as we all know my inquiry
25 today at this early 12(c) stage is whether Alta's third-party

1 claims against GE as now pleaded are plausible. Assuming all
2 of the allegations pleaded are true, is there a plausible
3 claim for relief as to the various causes of action asserted?
4 This is the so-called Iqbal Twombly standard.

5 So the Court focuses not on probability and we
6 don't know what all the evidence may or may not prove. This
7 is only about is there enough in the pleading to live another
8 day and see what discovery and the credible evidence
9 ultimately establishes.

10 And we also look at whether the complaint gives
11 fair notice of what is being alleged, and with respect to
12 fraud, is there enough particularity or specificity pleaded.

13 Here, the Court will deny the motion to dismiss
14 concluding that plausible claims have been articulated.

15 The one area I struggled a bit with was whether
16 fraud is sufficiently pleaded, the who, what, when, where and
17 how. We went back and considered the benchmark Fifth Circuit
18 case and others. I do conclude that these stand for
19 collectively the notion that what constitutes particularity
20 varies from case to case.

21 Here, while Lance Harrington of GE is not
22 specifically named in the body of the complaint, his July
23 31st, 2019 letter is specifically referenced and there's
24 plenty of the what, when, where and how, I think, to survive
25 this Rule 12(c) motion. There's enough there there.

1 I will throw out that significant facts here that
2 pointed towards survivability of the complaint are the July
3 31st, 2019 letter I just mentioned of Lance Harrington, the
4 dearth of formal documents as we talked about in oral
5 argument, and the general allegations that GE and Wattstock
6 shared a co-location, that Wattstock was operated by former
7 GE execs. And, again, these suggested to me that it's
8 plausible. The evidence might end up showing that there was
9 a joint enterprise or agency or partnership by estoppel.

10 Moreover, I believe the allegations make such
11 things as justifiable reliance and the possibility of
12 consequential damages plausible depending on what the
13 evidence shows.

14 So this is not a comment about the merits. We'll
15 see what the evidence ends up showing. But there's enough
16 there there to go forward and live another day.

17 So, again, I have the highest compliments for the
18 arguments and presentations today, but this is the ruling of
19 the Court.

20 I don't know if you all have in your scheduling
21 order anything about mediation, but I really want to -- I'm
22 hesitating to -- am I going to require it or just encourage
23 it. You know, I'm not sure at the end of the day the
24 possibility of damages. You know, it's been dangled out
25 there, this is a \$1.5 million case. You know, I can see

1 rounds of motions for summary judgment, and then if this goes
2 to trial, you know, it will get expensive for sure.

3 So have you all talked about mediation? Have you
4 put it in your scheduling order?

5 MR. LEGRAND: Your Honor, I can speak to that.

6 We do have a mediation in our scheduling order,
7 which I believe is 60 days from the date of the Court's
8 ruling.

9 THE COURT: Okay.

10 MR. LEGRAND: You know, for what it's worth, Your
11 Honor, I think we -- there's a major dispute about the value
12 of this case, and so that's why we brought the 12(c) motion.

13 THE COURT: Yeah. I don't know if --

14 MR. LEGRAND: So --

15 THE COURT: -- it's 1.5 or --

16 MR. LEGRAND: Exactly.

17 THE COURT: I just know that was dangled out there
18 probably by you. I don't know. But --

19 MS. PULLIAM: Yeah. We certainly -- our side
20 believes it's a lot more. That's just --

21 THE COURT: Uh-huh.

22 MS. PULLIAM: -- one piece of the alleged damages.

23 I have to refresh myself on the mediation, but
24 that's certainly something that we will explore with our
25 colleagues representing --

1 THE COURT: Okay --

2 MS. PULLIAM: -- GE.

3 THE COURT: -- because I believe this is Judge
4 Brantley Starr who will ultimately try this if it goes to
5 trial. And I don't have memorized off the top of my head his
6 standard scheduling order, but I know most of our District
7 Judges require mediation or at least a settlement conference.
8 So, you know, this -- again, you know, fascinating issues,
9 but a client never wants to hear, just like a patient doesn't
10 want to hear, oh, you have a really interesting case, you
11 know, if you're a patient the doctor saying that. You know,
12 let's bring in the medical students. You know, a client
13 doesn't want to hear that about his or her legal case, you
14 know.

15 So it could be a fascinating trial with fascinating
16 issues, but, gosh, settlement is always wonderful.

17 Mr. Berghman, you were standing up. Did you want
18 to --

19 MR. BERGHMAN: Your Honor, the scheduling --

20 THE COURT: -- add something?

21 MR. BERGHMAN: -- order provides for a mediation
22 within 45 days of a ruling, and I think, you know, that's
23 from today.

24 THE COURT: Okay.

25 MR. BERGHMAN: But I'm sure the parties can work on

1 that.

2 THE COURT: Very good. We'll see where that leads.

3 Ms. Pulliam, if you could just upload a simple
4 order denying the motion to dismiss.

5 MS. PULLIAM: Will do.

6 THE COURT: All right. Thank you.

7 We're adjourned.

8 MR. LEGRAND: Thank you, Your Honor.

9 MS. PULLIAM: Thank you, Your Honor.

10 THE COURT OFFICER: All rise.

11 (Whereupon, proceedings concluded at 12:19 p.m.)

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2 R U L I N G S

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4 PAGE

5 Rule 12 (c) Motion for Judgment on the
Pleadings filed by 3rd Party Defendant
6 General Electric International Inc.

7 Motion to dismiss adversary proceedings
Filed by 3rd Party Defendant General
8 Electric International, Inc. (30)

- DENIED

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C E R T I F I C A T I O N

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I, Nancy B. Gardelli of Acorn Transcripts, LLC,
hereby certify that the foregoing transcript is correct, to
the best of my ability from the audio received of the
proceedings in the above-entitled matter.

19

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/s/ Nancy B. Gardelli
Nancy B. Gardelli
Acorn Transcripts, LLC

Dated: August 25, 2022

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Florida Notary Public

My commission expires: June 28, 2023

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